WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD
ARCH A. MOORE, JR.
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SHERRY GASKINS

v. Docket No. 90-H-032

WEST VIRGINIA DEPARTMENT OF HEALTH
and WEST VIRGINIA DIVISION OF PERSONNEL

D E C I S I O N

Grievant, Sherry Gaskins, was hired as an LPN I at Lakin Hospital in September 1985 and remained in that job classification until she was promoted to an LPN II in June 1989. On July 19, 1989, she filed a grievance alleging she had been misclassified as an LPN I, rather than an LPN II, during a substantial portion of her employment at the hospital.[1]

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[1] The grievance was denied at levels I and II on July 20 and August 2, 1989, respectively. Following a level III hearing on November 13, 1989, the grievance was denied on January 16, 1990. Although the level III hearing was conducted by Emily A. Furr, the decision was rendered by Raymona A. Kinneberg, Deputy Secretary, Department of Health and Human Resources, who found the grievance to be untimely. She also concluded that the Division of Health was without statutory authority to grant the relief requested, because the responsibility for classification determinations and pay equity among state employees is vested exclusively within the Division of Personnel, which the Grievant had failed to join as a party. The level IV
(Footnote Continued)

The primary issue presented in this case is whether the misclassification grievance was timely filed. The Respondent filed a written motion to dismiss on the grounds that the grievance was neither filed within the ninety-day filing period established in AFSCME v. Civil Serv. Comm'n of West Virginia, 380 S.E.2d 43 (W.Va. 1989) (AFSCME IV), nor within ten days after Grievant was reclassified as required by W.Va. Code, 29-6A-4(a). The level IV hearing was limited to these issues, and the related question of whether the Respondent should be precluded from asserting a timeliness defense based upon the doctrine of equitable estoppel. After carefully considering the applicable law and all evidence of record, it is concluded that the grievance must be denied as untimely.

The Supreme Court of Appeals in AFSCME IV ruled that misclassification grievances are subject to the jurisdiction of the Grievance Board. In its sweeping decision, the Court also expressly allowed such "grievances to be filed within ninety days of this opinion," 380 S.E.2d at 50, and indicated that misclassified employees were entitled to back pay

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grievance was filed here on February 1, 1990, and after one continuance a level IV hearing was conducted on March 21, 1990. The undersigned joined the Division of Personnel as a party-respondent by letter dated February 15, 1990, but it did not appear or otherwise respond.

for the entire period of time they worked out of classification, subject only to a possible laches defense. See Cart v. W.Va. Dep't of Veterans Affairs, Docket No. 89-VA-070 (Nov. 29, 1989); Bannister v. W.Va. Dep't of Human Serv., Docket No. 89-DHS-251/252 (Nov. 3, 1989).

The AFSCME IV decision was issued on March 28, 1989. Rule 16 of the West Virginia Rules of Appellate Procedure prescribes the method for calculating the ninety-day time period.[2] Under this rule the Grievant had until Monday, June 26, 1989, to file the grievance. Since the grievance was not filed until July 19, 1989, it clearly was untimely under AFSCME IV.

That is not the end of the inquiry. Grievant argues she filed the grievance within ten working days of when she was officially notified of her promotion.[3] The Respondent

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[2] Rule 16 basically provides that the date from which the designated period of time begins to run is not included, while the last day of the time period is included unless it falls upon a Saturday, a Sunday or a legal holiday. See also Rule 6 of the West Virginia Rules of Civil Procedure. W.Va. Code, 29-6A-2(c), which defines "days" to mean "working days," is not applicable to back pay claims filed under AFSCME IV.

[3] Under the provisions of W.Va. Code, 29-6A-11, the Grievance Board lacks jurisdiction to grant back pay awards for any period prior to July 1, 1988, except for cases filed during the ninety-day jurisdictional window opened by AFSCME IV. Crookshanks v. W.Va. Div. of Rehab. Serv., Docket No. 89-RS-597 (Jan. 11, 1990).

argues, and the level three evaluator found, that the clock began to run on June 1, 1989, the effective date of Grievant's promotion. The parties disagree as to when the filing period began to run because of the circumstances surrounding Grievant's promotion. Grievant testified at level three that she was not officially notified of the promotion until she received a paycheck on June 23, 1989, reflecting the increased salary.

At level IV the WV-11 Personnel Action Form completed in connection with Grievant's promotion was introduced in evidence. It was executed by an official in what was then the Department of Finance and Administration on June 16, 1989. Although no evidence was introduced concerning State government promotion and hiring procedures at that time, it appears Grievant was not legally promoted until the date the WV-11 form was approved by Finance and Administration. That being the case, it follows that Grievant ceased working as an LPN I on June 16, 1989, and her alleged misclassification came to an end on that date as well.

The hearing examiner concludes that this was the date that the ten-day filing period began to run. This was, in the words of the statute, "the most recent occurrence of a continuing practice giving rise to a grievance." W.Va. Code, 29-6A-4(a). See AFSCME v. Civil Serv. Comm'n, 341 S.E.2d 693, 698 (W.Va. 1985) (civil service commission conceded working out of classification is continuing violation). When Grievant was officially notified that the promotion was

approved is irrelevant in a case like this where the Grievant has been aware of the continuing practice, here working out of classification, for a considerable period of time.

The recent decision by the West Virginia Supreme Court of Appeals in Spahr v. Preston County Bd. of Educ., (No. 19082 filed Mar. 23, 1990), is instructive here. There several teachers through administrative inadvertence were not included on a list of teachers to begin receiving supplemental pay in 1982. They subsequently heard rumors in 1986 that their colleagues were receiving the supplemental pay but this fact was not confirmed until October 3, 1986, when they met with their West Virginia Education Association representative. They invoked the grievance procedure within fifteen days after that meeting as required by W.Va. Code, 18-29-4(a)(3). This provision requires grievance proceedings to be instituted within "fifteen days of the date on which the event became known to the Grievant."

The Court concluded that this statutory language creates a discovery rule under which the time to invoke the grievance procedure does not begin until the Grievant knows of the facts giving rise to the grievance. Accordingly, the Court found that the grievance was timely and further that the teachers were entitled to recover for the previous years they had not been paid the supplement, because the discovery rule had, in effect, tolled the limitation period for the prior years. W.Va. Code, 29-6A-4(a) contains substantially

similar language and the same analysis would apply to grievances filed under the grievance procedure for state employees, W. Va. Code, 29-6A-1 et seq.

The key factor under Spahr, is when the employee learns of the allegedly illegal continuing practice. In this case, unlike Spahr, the Grievant had knowledge of the alleged misclassification and consequently the filing period was not tolled. The Grievant also acknowledged in testimony at level III that she had been verbally informed of the promotion by Mr. David Ross, the hospital's personnel director, sometime prior to receiving her first paycheck reflecting her higher salary.

The next question is whether Grievant filed within ten working days of the date her promotion was approved on June 16, 1989. W.Va. Code, 29-6A-3(a) provides, in pertinent part, that the "time limits shall be extended whenever a Grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the Grievant to take personal leave... ." At the level IV hearing, evidence was introduced in an attempt to establish the grievance was timely filed, because she was off work a substantial number of days due to annual leave, sick leave and holidays in late June and in July.[4] The record does not support this contention.

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[4] As noted earlier, W.Va. Code, 29-6A-2(c) defines "days" to mean "working days exclusive of Saturday, Sunday (Footnote Continued)

The evidence reveals the Grievant worked on June 19, 20, 21, 22, and on July 5, 6, 7, 10, 14, 17, 18 and 19, 1989. In addition, during the period between her promotion and the date the grievance was filed, she took annual leave four days and was scheduled off work on five additional working days. The grievance was thus not filed within ten working days after Grievant's reclassification. While this result may seem harsh, the statute must be complied with and here it was not. Filing close to the deadline does not, in and of itself, constitute substantial compliance with the demands of the law.

Although Grievant testified at level III that she was unaware of her right to file a misclassification grievance seeking back pay until a short time before she filed the grievance, this does not excuse her failure to file in a timely fashion in the eyes of the law. Ignorance of one's right to invoke the grievance procedure will not excuse the failure to file within its prescribed time limits. Otherwise, the time limits would be rendered meaningless. This principle has been recognized in numerous cases. E.g. Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49

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or official holidays." The Respondent took the position at the level IV hearing that such absences were not excludable in calculating the filing deadline. This appears contrary to the express language of W.Va. Code, 29-6A-3(a), but it is unnecessary to pass on this question in view of the determination that the grievance was not timely filed.

(Mar. 23, 1989); Archibald v. Randolph County Bd. of Educ., Docket No. 42-88-171 (Dec. 9, 1988).

Grievant's final contention is that Respondent should not be permitted to rely upon a timeliness defense. It is true that the time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver and estoppel. See Spahr, supra; Durruttya v. Board of Educ. of Mingo, 382 S.E.2d 40 (W.Va. 1989) (substantial compliance). See also Naylor v. W.Va. Human Rights Comm'n, 378 S.E.2d 843 (W.Va. 1989); Independent Fire Co. No. 1 v. W.Va. Human Rights Comm'n, 376 S.E. 2d 612 (W.Va. 1988).

The Grievance Board has applied the doctrine of equitable estoppel in numerous decisions. See e.g., Hutchison v. W.Va. Dep't of Highways, Docket No. 89-DOH-471 (Jan. 31, 1990) (estoppel not created by Respondent's failure to render a timely decision); Moore v. Mason County Bd. of Educ., Docket No. 26-88-210 (Mar. 1, 1989) (representations about when to file) ; Blevins v. Fayette County Bd. of Educ., Docket No. 10-87-161 (Oct. 22, 1987) (estoppel based upon Superintendent's representations); Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987) (good faith reliance on promises to rectify problem).

The Grievant contends the Respondent should be estopped from relying on timeliness as a defense based upon the following evidence. Grievant testified that she assumed the

duties of an LPN II who resigned in approximately November of 1986. During this time period, she spoke to the personnel director who advised her, during the course of a discussion in a hallway about her alleged performance of LPN II duties, that there was no point in pursuing the matter because there were no LPN II positions available. The personnel director, who testified at level IV, had no specific recall of this particular conversation and denied any attempt to prevent the Grievant from filing a grievance or to discourage her from exercising her rights.

This evidence is not sufficient to support a finding of equitable estoppel. In addition to the fact that this conversation took place years before the AFSCME IV decision and Grievant's promotion, Mr. Ross's statements, as testified to by the Grievant, do not appear to have been intended to mislead or lull the Grievant into believing that filing a grievance or exercising whatever rights she had at that time would not be necessary. His alleged statements seem more in a nature of simple comment about existing staffing plans, and the remarks were not of such a nature that they would unmistakably cause an employee to delay filing a grievance. Unlike the situation in Blevins and Steele, supra, no managerial employee promised the matter in controversy would be rectified. Indeed, the alleged statements were to the effect that there was no hope that Respondent would voluntarily act to rectify the alleged problem.

The foregoing findings of fact and conclusions of law are incorporated into and made a part of the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant was employed as an LPN I on September 23, 1985, at Lakin Hospital.

2. In response to a job vacancy posting, the Grievant filed an application dated April 7, 1989, for an LPN II position.

3. A WV-11 Personnel Action Form effecting Grievant's promotion to an LPN II position was executed by an official in what was then the Department of Finance and Administration on June 16, 1989, and was made effective retroactively to June 1, 1989. Grievant received her first paycheck reflecting the salary increase associated with the promotion on June 23, 1989.

4. The most recent occurrence of the alleged continuing practice, i.e., working the Grievant out of classification, occurred on June 16, 1989, when the WV-11 Personnel Action Form was executed by an appropriate authority in the Department of Finance and Administration.

5. The misclassification grievance was filed on July 19, 1989.

6. The Grievant worked on June 19, 20, 21, 22, and on July 5, 6, 7, 10, 14, 17, 18 and 19, 1989.

7. The Grievant did not file within ten working days of the most recent occurrence of the alleged continuing practice.

8. The Grievant had been aware of the allegedly illegal continuing practice for a considerable period of time but did not file a grievance challenging the practice until after she spoke with a union representative and was advised of her rights under the grievance procedure statute.

9. The Respondent's personnel director did not attempt to mislead or lull Grievant into not filing a grievance.

Conclusions of Law

1. Grievant is not entitled to any relief based on the decision in AFSCME IV, because the grievance was not filed within the ninety-day time period it established for filing back pay claims.

2. The grievance was not filed within ten working days of the most recent occurrence of the alleged continuing practice as required by W.Va. Code, 29-6A-4(a).

3. Ignorance of the existence of the grievance procedure for state employees, W.Va. Code, 29-6A-1 et seq. (1988), will neither toll nor excuse the failure to file a timely grievance.

4. The facts and circumstances in this case do not support the conclusion that the Respondent should be equitably estopped from relying on a timeliness defense.

Accordingly, the grievance is **DENIED** as untimely.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Mason County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

C. Ronald Wright

C. RONALD WRIGHT
ADMINISTRATOR/HEARING EXAMINER

Date: April 12, 1990